Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No.: 80-676

IN THE

Supreme Court of the United States

October Term, 1980

GERALD L. SHARGEL, ATTORNEY ON BEHALF OF VINCENT ALOI,

Petitioner,

-against-

CHARLES E. FENTON, WARDEN OF THE FEDERAL PENITENTIARY AT LEWISBURG AS AGENT FOR THE STATE OF NEW YORK; AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 24, 1980

Questions Presented

Does *United States v. Apfelbaum*, 445 U.S. ____, 100 S.Ct. 948 (1980) apply to a case where the prosecution introduces at a perjury trial truthful immunized testimony which is *not relevant* to the *corpus delicti* of the perjury?

List of Parties

There are no parties in this action other than those named in the caption.

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No.:_____

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GERALD L. SHARGEL, ATTORNEY ON BEHALF OF VINCENT ALOI,

Petitioner,

-against-

CHARLES E. FENTON, WARDEN OF THE FEDERAL PENITENTIARY AT LEWISBURG AS AGENT FOR THE STATE OF NEW YORK; AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Gerald L. Shargel, on behalf of Vincent Aloi, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit vacating its earlier judgment in *Shargel v. Lefkowitz*, 596 F.2d 42 (2d Cir. 1979) and directing that the District Court dismiss the petition for a writ of habeas corpus.

Opinion Below

The District Court opinion granting habeas corpus relief is reported in *Shargel v. Fenton*, 459 F.Supp. 700 (S.D.N.Y. 1978). The Second Circuit's opinion affirming that order is found in *Shargel v. Lefkowitz*, 596 F.2d 42 (2d Cir. 1979). The Court of Appeals' order vacating its earlier judgment and directing that the habeas petition be dismissed is unreported and appears in the appendix at page 1a.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit vacating its earlier judgment and directing that the habeas corpus petition be dismissed is dated June 2, 1980. A timely petition for rehearing and hearing *en banc* was denied on August 25, 1980. A copy of the orders denying the petition for rehearing appears in the appendix hereto at page 3a. This court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

Constitutional Provisions Involved in the Case

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

This petition marks the second occasion on which this case is before the Court. Earlier this year the Court granted the now respondent's petition for writ of certiorari and vacated the judgment of the Second Circuit Court of Appeals in *Shargel v. Lefkowitz*, 596 F.2d 42. *Attorney General of the State of New York v. Shargel*, ____ U.S. ____, 100 S.Ct. 1305 (1980). On remand the Court of Appeals vacated its earlier judgment and mandate and directed the District Court to dismiss the habeas petition in light of *United States v. Apfelbaum*, 445 U.S. ____, 100 S.Ct. 948 (1980). This petition for certiorari follows.

As noted by this Court in its memorandum decision the facts of this case appear in *Shargel v. Fenton*, 459 F.Supp. 700 and *Shargel v. Lefkowitz*, 596 F.2d 42. The facts are also set forth and discussed in the original petition for writ of certiorari and the then respondent's brief in opposition. For purposes of continuity and context, however, the facts will again be briefly stated.

On November 28, 1972, Vincent Aloi appeared, pursuant to subpoena, before a New York County Grand Jury which was investigating the murder of one Joseph Gallo. Upon his refusal to sign a waiver of immunity, Aloi automatically received transactional immunity pursuant to New York statute. CPL § 190.40.*

According to the Grand Jury Foreman, who appeared as a witness at Aloi's perjury trial, "several dozen" witnesses testified before the Grand Jury on

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*Section 50.10 of the New York Criminal Procedure Law defines the immunity conferred by section 190.40 as "transactional" immunity, rather than the more limited "use" immunity afforded by federal statute, 18 U.S.C. § 6002. See, *Kastigar v. United States*, 406 U.S. 441 (1972).

the subject of Gallo's death. (A 30-31)* These witnesses, the Foreman testified, "named certain individuals as the murderers of Mr. Gallo." (A 34) It was disclosed to the Grand Jury that a certain apartment in Nyack, New York had served as the nerve center of the conspiracy. (A 34) It was alleged by these witnesses that petitioner and others met at the apartment both before and after the Gallo murder. (A 34-36) In the Foreman's word:

> We were told by witnesses that the murder of Mr. Gallo had been plotted in this apartment and that it was used after the murder by individuals to try to cover up the murder and as a hang out. (A 35)

In his appearance before the Grand Jury, Aloi denied that he had ever been present at the Nyack apartment. (T 455-56) As a result of these denials and these denials alone, petitioner was indicted, tried and ultimately convicted of perjury. As pleaded in the indictment, petitioner

> ...swore falsely...that he, the defendant, never visited 101 Gedney Street, apartment LK, in Nyack, New York.
>
> Whereas, in truth and in fact as defendant well knew said testimony was false, and the truth was that the defendant visited 101 Gedney Street, apartment LK, in Nyack, New York.

Three witnesses were called by the prosecution to support its contention that Aloi had indeed visited the apartment. Yet this was not the prosecution's most potent proof. Over defense counsel's objection the prosecution was permitted to put into evidence virtually all of Aloi's immunized testimony before the Grand Jury. Except for a particular deletion regarding other subpoenas to which petitioner was then

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*The letter "A" refers to the joint appendix on file in the United States Court of Appeals for the Second Circuit.

subject (T 359-62), the entire testimony was read to the jury subject only to the court's instruction that the majority of it was relevant only to the issue of materiality. (A 50-53) As analyzed by the District Court judge who would later grant habeas relief:

> The minutes of petitioner's testimony before the grand jury constitute 90 pages of the trial record. Of that material, 59 pages, or nearly two-thirds of the minutes, relate to matters which appear altogether immaterial both to the alleged perjurious statement to developing the context in which the perjured testimony was given. Questions and answers concerning the nature of Aloi's business, how the business was run, where it was located, the dates during which Aloi worked, and the extent of income derived from it, formed the substance of this material. (Trial Transcript pages 378-437) An additional 18 pages of testimony concern matters only somewhat relevant to developing the context of the perjury, which at the same time are, however, quite incriminating in regards to petitioner's organized crime connections. Question[s] and answers here concerned the nature of petitioner's relationship with such individuals as Messrs. DiBiasi, Luperelli and Yacavelli (sic), and included such questions as (Transcript at 447), 'Do you know his nickname?' (Transcript at 437-455). Only 9 pages of the minutes contain questioning which is directly relevant to the issue of petitioner's presence in the Nyack apartment. (Transcript at 456-464.) 459 F.Supp. at 705-06 n.

Although the alleged act of perjury related to petitioner's singular assertion that he had never been to apartment LK at 101 Gedney Street, Nyack, New York, this topic, viewed liberally, was covered in some fifty-seven questions and answers before the Grand Jury. The prosecutor's tireless framing

and reframing of substantially the same question was met with petitioner's equally tireless denials with substantially the same answer. If the petit jury were to believe the People's witnesses, these fifty-seven questions clearly established the *corpus delicti* of the crime and would, therefore, have completed the People's *prima facie* case. These questions, of course, did not bear on the issue of materiality but, rather, went to the issue of petitioner's alleged false testimony.

On the question of materiality, pursuant to instructions of the trial court, the jury was allowed to consider some 502 additional questions and answers. The relevance of this other testimony to the question of materiality ranged from somewhat relevant to completely irrelevant. Interestingly, of these 502 other questions and answers, 335 related to petitioner's employment and business interests which had no conceivable relevance to the inquiry of the Grand Jury before which Aloi appeared. These pressing questions, during which the prosecutor verbally sparred with the witness, were introduced only to convince the petit jury that the defendant on trial before them was in reality, not a businessman but, rather, a gangster who would by his nature resort to perjury. Petitioner's contention has been that the introduction of the more than 300 questions and answers relating to other than the *corpus delicti* of the perjury was constitutional error.

Reasons for Granting the Writ

From the point that this immunized testimony was introduced at Aloi's trial he has made the claim that its introduction violated his Fifth Amendment right against self-incrimination. On direct appeal from his conviction and indeed upon the bringing of his original habeas corpus petition Aloi primarily relied upon an earlier Third Circuit decision in *United*

States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973) and this Court's decision in *Cameron v. United States*, 231 U.S. 710 (1914).

When habeas relief was finally granted by the District Court the Third Circuit had then recently decided *United States v. Apfelbaum*, 584 F.2d 1264 (3rd Cir. 1978) and that decision found a significant place in the Court's opinion. But of even more significance is the factual analysis made by the District Court. As noted in the statement of facts, the Court found that nearly two-thirds of Aloi's truthful immunized testimony before the Grand Jury was "altogether immaterial" to both the alleged perjury and to "developing the context in which the perjured testimony was given." There is therefore an immediate distinction to be made between this case and *Apfelbaum*. *Apfelbaum* dealth with truthful immunized testimony which was *relevant* to the *corpus delicti* of the perjury. In the instant case the truthful immunized testimony which petitioner focuses upon is, as the habeas court found, completely irrelevant or immaterial to the perjury. In short, petitioner contends that *Apfelbaum* should not be held to apply to this case and that it is the Fifth Amendment which prohibits the introduction of immunized testimony which is completely irrelevant to the perjury allegedly committed.

Most worthy of note is that the Second Circuit Court of Appeals, in its opinion affirming the District Court's granting habeas relief, did so *without* relying upon the Third Circuit's decision in *Apfelbaum*.

> We find it unnecessary to decide in this case whether the *Apfelbaum* more liberal standard should be applied to determine the extent to which Aloi's immunized testimony may be used to prove that he gave perjurious testimony in the same proceeding since, even under the more liberal *Cameron* standard, it was clearly improper to admit virtually all of his immunized grand jury testimony. 596 F.2d at 44.

The court also found that the immunized testimony had "*no probative value* in determining whether the alleged perjurious portion was intentionally false." (*Id.*) (Emphasis supplied)

The *Apfelbaum* case deals with a situation where, as earlier noted, the disputed testimony was relevant. This court concluded therefore that "...neither the immunity statute nor the Fifth Amendment preclude the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence." 445 U.S. at ____ , 100 S.Ct. at 957-58. In the Aloi case, since the testimony was found by both the District Court and the Court of Appeals not to have been relevant, it is the Fifth Amendment which precludes introduction. *Cameron v. United States, supra.* Plainly stated, there is a constitutional shield which bars introduction of truthful immunized testimony which has no conceivable bearing on the prosecution's perjury case. Thus, where a state trial judge rules such testimony admissible, a clear constitutional violation results.

Both concurring opinions in *United States v. Apfelbaum* take issue with the expansive nature of the majority opinion. As stated by Mr. Justice Brennan:

> I do not think that the present result compels the conclusion that there are no special constitutional constraints on the use to which immunized testimony may be put in a perjury prosecution... 445 U.S. at ____ , 100 S.Ct. at 958

The instant case is worthy of this court's consideration because it may provide a useful counterpoint to *Apfelbaum* in showing that there are constitutional constraints upon the use of truthful immunized testimony.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Attorney for Petitioner
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New York, New York 10019
(212) 541-7105

October 24, 1980

APPENDICES

Appendix A
Order of United States Court of Appeals

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, One Thousand Nine Hundred and Eighty.

Present: HONORABLE STERRY R. WATERMAN,
HONORABLE WALTER R. MANSFIELD,
HONORABLE WILLIAM H. TIMBERS,
Circuit Judges.

Docket No. 78-2143

GERALD L. SHARGEL, Attorney in Behalf of Vincent Aloi,

Petitioner-Appellee,

-against-

CHARLES E. FENTON, Warden of the Federal Penitentiary at Lewisburg, etc., et al.,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent-Appellant.

Appendix A
Order of United States Court of Appeals

The action herein having been taken to the Supreme Court of the United States by writ of certiorari and a certified copy of the judgment of the said Court having been received and filed vacating with costs the judgment of this court and remanding the said action to this court for consideration in light of *United States v. Apfelbaum*, 445 U.S. ____ (1980).

UPON CONSIDERATION THEREOF, it is

ORDERED, that the judgment of this court of March 13, 1979, and the mandate issued thereunder be and they hereby are vacated and that the case is remanded to the district court with directions to vacate its judgment and to dismiss the petition for a writ of habeas corpus in light of *Apfelbaum*.

/s/ _____
Sterry R. Waterman, U.S.C.J.

/s/ _____
Walter R. Mansfield, U.S.C.J.

/s/ _____
William H. Timbers, U.S.C.J.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of August, one thousand nine hundred and eighty.

78-2143

GERALD L. SHARGEL, Attorney in behalf of Vincent Aloi,

Petitioner-Appellee,

-against-

CHARLES E. FENTON, Warden of the Federal Penitentiary at Lewisburg, etc., et al.,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by petitioner-appellee Gerald L. Shargel, Attorney in behalf of Vincent Aloi, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ _____
Wilfred Feinberg
Chief Judge

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of August, one thousand nine hundred and eighty.

Present: HON. STERRY R. WATERMAN
HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges.

78-2143

Gerald L. Shargel, Attorney in behalf of Vincent Aloi,
Petitioner-Appellee.

v.

Charles E. Fenton, Warden of the Federal Penitentiary at Lewisburg, as Agent for the state of New York; and Louis J. Lefkowitz, Attorney General of the State of New York,
Respondents,

Louis J. Lefkowitz, Attorney General of the State of New York,
Respondent-Appellant.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

A petition for a rehearing having been filed herein by counsel for the Petitioner-appellee, Gerald L. Shargel,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ _____

A. Daniel Fusaro
Clerk

by Rolanne Henry
Deputy Clerk